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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 71

BEKINS MOVING & STORAGE COMPANY, *Petitioner*

v.

DONALD JOHNSON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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Petitioner, Bekins Moving & Storage Co., hereinafter referred to as "Petitioner" or "Bekins", respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decisions of the Supreme Court of the State of Idaho, entered in the above cause on November 28, 1963 (Initial Decision) and on February 12, 1964 (Decision denying Petition for Rehearing), wherein a judgment of the District Court of the Fifth Judicial District of the State of Idaho, Bannock County, was affirmed.

CITATIONS TO OPINIONS BELOW

The opinions of the Supreme Court of the State of Idaho, reproduced in full as Appendix I hereto, are reported in 389 P. 2d 109.

The Memorandum Opinion, and Findings of Fact and Conclusions of Law, of the District Court for the Fifth Judicial District of Idaho, Bannock County, reproduced in full as Appendix II hereto are not reported.

JURISDICTION

Petitioner seeks review of the decisions of the Supreme Court of the State of Idaho dated and entered November 27, 1963 (Initial Decision) and February 12, 1964 (Decision denying Petition for Rehearing). Jurisdiction of this Court is invoked under Title 28, U.S.C., section 1257(3).

QUESTIONS PRESENTED

(1) Whether the provisions relating to the limitation of liability of a common carrier for damage to property received by it for transporatation in interstate commerce, as set forth in Section 20(11) and 219 of the Interstate Commerce Act, in the regulations and orders of the Interstate Commerce Commission issued pursuant thereto, and in the tariffs of such common carrier lawfully filed with the Interstate Commerce Commission, establish the limit of liability of the carrier for an article negligently damaged by the carrier in the course of performing the interstate transportation, when the carrier failed to pack such article in accordance with specifications in the contract of carriage?

(2) Whether the State Court should have submitted to the Interstate Commerce Commission, as a matter within the primary jurisdiction of the Commission, the question of whether the regulations and orders of the Commission and the tariffs lawfully on file with the Commission, prescribing the limitation of liability of household goods common carriers for damage to property received by them for transportation in interstate commerce, establish the limit of liability of a carrier for an article negligently damaged by the carrier in the course of performing the interstate transportation, when the carrier failed to pack such article in accordance with specifications in the contract of carriage?

STATUTES AND REGULATIONS

The pertinent statutory provisions involved are Sections 20(11), 217, and 219 of the Interstate Commerce Act, Title 49, U.S.C., Sections 20, 317, and 319, respectively. These statutory provisions are printed in Appendix III hereof, pp. 23a-27a.

The pertinent regulatory provisions involved are General Regulations of the Interstate Commerce Commission, Part 176—Transportation of Household Goods, Section 176.9, Liability of Carriers, Subsection (a) Liability Restricted, 49 C.F.R. 176.9; and Interstate Commerce Commission Released Rates Order No. MC-362, dated May 24, 1954 (no official citation), both of which are printed in Appendix III hereto, pp. 28a-29a.

STATEMENT OF THE CASE

This case was submitted on a Stipulation of Facts and without trial to the District Court for the Fifth Judicial District of Idaho for final decision on the merits. The Stipulation of Facts is printed in full in Appendix IV hereto.

The facts necessary to a complete and accurate understanding of the questions presented may be fully summarized as follows: Petitioner is, and at all times pertinent to this case has been, a motor common carrier engaged in the transportation of household goods in interstate commerce under a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission and pursuant to tariffs duly filed with that Commission in accordance with the provisions of the Interstate Commerce Act and rules and regulations of the Commission.

On August 17, 1960, at Highland Park, N.J., respondent delivered to petitioner a shipment of household goods to be transported by petitioner to Pocatello, Idaho. Petitioner issued to respondent its standard bill of lading, which both petitioner and respondent signed. One of the accessorial services specified on the bill of lading was that petitioner would furnish a barrel, into which it would pack respondent's hi-fi set, for the additional charge of $8.00 as published in petitioner's tariff for such accessorial service. For reasons unknown, petitioner did not pack the hi-fi set in a barrel, but instead transported it wrapped in pads and blankets. In the course of the transportation, the furniture in the shipment, including the hi-fi set, was damaged.

Petitioner accepted responsibility for the damage, refunded to respondent the additional charge made for the barrel, which was not used, and thereafter settled with respondent for all damages, except to the hi-fi set, in accordance with the limitation of liability provision of 30 cents per pound per article appearing on the bill of lading and in petitioner's tariff on file with the Commission. Respondent demanded that petitioner

pay for damage to the hi-fi set at the full value thereof (which greatly exceeded 30 cents per pound), rather than in accordance with the released rate limitation of liability specified on the bill of lading and in the tariff. Petitioner refused, and this litigation ensued. Damages were awarded to respondent by the District Court in the amount of $555.00, based on the full value of the hi-fi set, rather than for $15.00, the limitation of liability based on the released rate paid by respondent. On appeal the Supreme Court of Idaho affirmed.

The afore-mentioned bill of lading, issued by petitioner to respondent in receipt for the shipment, contained on its face the following printed statements, among others (Exhibit 3, Record).

> "Received property tendered, pursuant to order for service (if any) and subject to the classifications and tariffs, rules and regulations in effect on the date of the issue of this bill of lading.
>
> "Every service to be performed by carrier hereunder shall be subject to all of the terms and conditions, whether printed or written, set forth herein, including those on the reverse side, all of which are hereby ageed to and accepted by shipper for himself and his assigns.
>
> "NOTICE: Unless a different value for the entire shipment is declared in the paragraph below, the shipper hereby releases and declares the value and limits the liability of the carrier to not exceeding 30 CENTS PER POUND FOR EACH ARTICLE as provided in the contract terms and conditions printed on the reverse side hereof (see especially Section 1)."

The respondent (shipper) did not declare on the bill of lading (or elsewhere) " a different value for the

entire shipment" than the 30 cents per pound per article specified on the bill of lading.

The applicable tariff of petitioner, duly filed with the Commission, and in force and effect at the time the shipment was accepted by petitioner from respondent, was Household Goods Carriers' Bureau, Agent, Tariff No. 78-B, MF-I.C.C. No. 90 (Exhibit 4, Record). The above-quoted limitation of liability provision appearing on the bill-of-lading also is set forth in Rule 3 of said tariff. Rule 3 is published in full in Appendix V hereto. Section (d) of that Rule states: "The released value shall be deemed to relate to all services undertaken by the carrier or its agents."

The limitation of liability provision appearing on the bill-of-lading and in Rule 3 of the aforesaid tariff is based upon the Released Rates Order No. MC-362 of the Interstate Commerce Commission issued May 24, 1954 (and still in effect) (Exhibit 5, Record). That Order was issued by the Commission in accordance with and pursuant to Sections 20(11) and 219 of the Interstate Commerce Act (49 U.S.C. 20(11), 319). The said Order is printed in full in Appendix III hereto. The second paragraph of said Order specifically states that it shall apply, not only to rates for transportation, but also to "charges for accessorial services in connection therewith".

The Commission, in its General Regulations applicable to household goods common carriers, has specifically enjoined the household goods carriers from deviating from their bills of lading and tariffs in the matter of liability for loss or damage of property in their custody. Part 176.9(a) of the Commission's

Regulations (49 C.F.R. 176.9), also printed in Appendix III hereto, states:

> "(a) LIABILITY RESTRICTED. Common carriers by motor vehicles of household goods shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs."

The Idaho District Court decided that the foregoing provisions of the bill-of-lading, the tariff, the Commission's Released Rates Order, and the Commission's Regulations did not apply to the carrier's liability for damage to the hi-fi set, and the Supreme Court of Idaho affirmed that decision.

THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED

The Federal questions involved herein were raised in a timely manner and considered by both the Idaho District Court and by the Idaho Supreme Court. The Stipulation of Facts (Appendix IV hereto), presented to the Idaho District Court by the parties and made a part of the Record before both Courts, sets forth that petitioner's certificate of public convenience and necessity was issued by the Interstate Commerce Commission, that the transportation was performed under that certificate and pursuant to petitioner's tariff lawfully on file with the Commission and the rules and regulations of the Commission, and that the limitation of liability provisions on the bill-of-lading and in the tariff were in accordance with the Released Rates Order No. MC-362 of the Commission. The bill of lading, the tariff, and the Commission's Released Rates Order No. MC-362 were all made part of the record as exhibits attached to the Stipulation of Facts.

In his Memorandum Opinion the Idaho District Court Judge stated (Appendix II, p. 19a):

> "The question for the court's decision being whether the plaintiff is bound by the released rate of 30¢ per pound, or whether plaintiff can in fact recover actual value of the hi fi set in the amount of $555.
>
> "At the outset the Court agrees with that portion of defendant's position wherein the defendant alleges that any contract which prefers one shipper over another is void as being prohibited by the I.C.C. regulations. However, the Court is of the opinion that a contract to handle certain items specially, supported by consideration, is a contract separate and apart from the rate provisions of the I.C.C. regulations, is not contrary thereto and is not a preference as contemplated by I.C.C. regulations."

The Opinion of the Supreme Court of Idaho (Appendix I) recites in detail the fact that petitioner was performing transportation in interstate commerce pursuant to the certificate of public convenience and necessity issued to it by the Interstate Commerce Commission and in accordance with its tariff on file with the Commission and with the rules and regulations promulgated by the Commission (Appendix I, p. 2a) The Supreme Court of Idaho also quotes the pertinent provisions from the bill-of-lading, cites the corresponding tariff provisions, and quotes relevant language from the Commission's Released Rates Order No. MC-362. (Appendix I, pp. 2a-4a). The Supreme Court of Idaho acknowledged petitioner's contention that the limitation of liability provisions in the bill of lading and tariff fix the liability of petitioner for all aspects of the contract of carriage and is binding

upon both petitioner and respondent under the provisions of the Interstate Commerce Act and the orders and regulations of the Commission, but the Supreme Court disagrees with petitioner's contention and concludes that those rules, regulations, orders, and tariff provisions are not applicable to the facts of this case (Appendix I, pp. 7a, 15a).

Thus, the Federal questions here presented were fully considered by both the Idaho District Court and the Idaho Supreme Court.

REASONS SUPPORTING THE GRANT OF THE WRIT

(a) Preliminary Statement

There is a clear and pressing need for this Court to express itself on the questions involved in this proceeding. The issue here is not the matter of the $500 that has been in dispute since 1960 between Bekins and Mr. Johnson. The issue is a far more serious and far-reaching one affecting the basic rate structure and liability of the more than 2000 household goods motor carriers engaged in interstate commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission. The same bill-of-lading provisions, tariff rules, and Interstate Commerce orders and regulations in issue in this proceeding apply not only to Bekins but also to all the other major household goods carriers engaged in interstate transportation.*

* As a matter of fact, the issues here involved have equal application to surface and air carriers engaged in the transportation of railway express, air express, and air freight, because each of those forms of transportation has a rate structure based upon declaration of value by the shipper and a correlated rate and limitation of liability set forth in tariffs on file with the Interstate Commerce Commission or the Civil Aeronautics Board.

The rate structures of all the motor carriers of household goods, as set forth in their tariffs duly filed with the Commission, are based upon and incorporate the Released Rates Orders of the Commission. Under those Orders and tariffs, the rates charged by the carriers and the liability to the shipper vary directly with the value of the shipment as declared by the shipper on the bill-of-lading (See Appendix III, p. 28a). This is necessary because, in the transportation of household goods, the element of risk of damage is very high, and a reasonable rate structure can be developed only by correlating the rate paid by the shipper with the liability assumed by the carrier. This is accomplished, under the Released Rates Order No. MC-362 of the Commission, by establishing a liability limit for the carrier of 30¢ per pound per article at the base rate or charge, with an additional charge payable by the shipper at the rate of 50¢ per $100 of excess valuation on the shipment declared by him over the 30¢ per pound limitation. Under the Released Rates Order No. MC-362, this is the *only* method by which the shipper may impose upon the carrier a liability in excess of 30¢ per pound per article. The decision of the Idaho Supreme Court would undermine this entire system of rate-making by permitting the shipper to recover the full value of the damaged article (rather than 30¢ multiplied by the weight in pounds of the article) without any declaration of excess valuation by the shipper and without the payment of any excess valuation charge.

The decision of the Idaho Supreme Court is clearly inconsistent with the express language in the Regulations and Released Rates Orders of the Commission, and in the bills-of-lading and lawfully filed tariffs of

the carriers. Under these circumstances the household goods carriers will not accept the Idaho Court decision as a precedent for nation-wide application in claim settlements, but shipper-claimants certainly will demand its recognition everywhere. Over 800,000 shipments are handled annually in interstate commerce by the household goods carriers, and in approximately 20 per cent of these movements a claim for loss or damage is filed by the shipper with the carrier.* Thus, the Idaho Court decision will inevitably lead to a large volume of endless litigation, unless this Court grants certiorari and either (a) declares whether the regulations and orders of the Interstate Commerce Commission here in issue, and the tariff provisions issued thereunder and filed with the Commission, are to be applied uniformly and in accordance with their express terms, or whether they are subject to individual interpretations and exceptions by the State courts, or (b) remands this case to the Idaho Supreme Court with instructions to refer to the Interstate Commerce Commission the matter of defining and interpreting the scope, intent and application of its regulations and orders and the tariffs filed with it.

(b) The Supreme Court of Idaho Has Decided a Substantial Federal Question Not in Accord With Applicable Decisions of This Court

The Supreme Court of Idaho has treated this as a case of first impression, and in distinguishing the decisions of this Court upholding the applicability of tariff rules, authorized by and filed with the Interstate

* Verified Statements of the Bureau of Motor Carriers and the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, filed May 15, 1961, in I.C.C. Docket No. MC-19.

Commerce Commission, limiting the liability of common carriers, stated in its decision (Appendix I, p. 15a):

> "None of them dealt with the precise and, indeed, the unique question of the effect to be given a special covenant in determining whether a carrier had effectively limited its liability for the damage in transit to the shipper's goods. This special covenant—for the protective packaging of respondent's hi-fi set—which respondent specifically requested and appellant specifically agreed to perform upon receipt of an additional charge, is the precise ground upon which we affirm the decision of the trial court."

While it is true that this precise question has not been decided by this Court with respect to household goods carrier tariffs and the regulations and orders of the Interstate Commerce Commission relating to household goods carriers, this Court has consistently held that tariff rules, authorized by and filed with the Interstate Commerce Commission, limiting the liability of other types of common carriers, are enforceable and must be applied in accordance with their terms under circumstances similar to those in this proceeding. *Adams Express Co.* v. *Croninger*, 226 U.S. 491; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U.S. 639; *Boston & Maine R.R. Co.* v. *Hooker*, 233 U.S. 97; *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U.S. 278; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U.S. 173; *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28.

The Supreme Court of Idaho in its Opinion (Appendix 1, p. 6a) conceded that there was only one contract in this proceeding, and that such contract

covered both the transportation and the accessorial services. The orders and regulations of the Commission and the tariff rules filed with the Commission, relating to the limitation of liability of household goods carriers, expressly extended to both the transportation services and the accessorial services covered by the contract. In *Southeastern Express Co.* v. *Pastime Amusement Co., supra,* this Court, quoting from one of its earlier decisions with respect to the scope of the released rate provisions of section 20(11) of the Interstate Commerce Act, stated (299 U.S. 29):

> 'The words of the statute 'are broad enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination' ".

Thus, the Released Rates Order No. 362 of the Commission, which expressly extended the limitation of liability to "commodity rates for the transportation and charges for accessorial services in connection therewith of household goods" (Appendix III), was clearly within the scope of the statute.

In this case, the Idaho court construed the request for a particular type of packing for the hi-fi set (for which a separate charge was made) as placing the hi-fi set outside the limitation of liability provisions, in the event there was a breach of this particular part of the contract. It regarded this transaction as unique, and therefore distinguishable from all the precedent cases of this and other courts relating to the applicability of the limitation of liability provisions. Actually, there is nothing unique about this case. The household goods carriers in their tariffs offer many types of accessorial services at additional charges to persons who are mov-

ing their households (Tariff, Exhibit 4, Record). The additional charge is for the additional labor and material required and has no relationship whatsoever to the charge made for excess valuation, if an excess value declaration is made by the shipper. Under the doctrine of the Idaho court, a breach in performing or in failing to perform any of these accessorial services which the carrier contracts to perform would invalidate the limitation of liability provision. By the same token, it could well be argued, under that doctrine, that the breach of any covenant by the carrier, including the basic covenants in every common carrier contract of carriage, namely, to deliver the goods within a reasonable time, to the designated consignee, at the address specified, and in the same condition as when received, would invalidate the limitation of liability provision.

The Idaho court, in effect, is saying that the carrier can claim the benefit of the shipper's covenant of limited liability only if it performs its covenants. This position is untenable. In facing this same contention in a case involving the application of a limitation of liability provision in an airline tariff filed with the Civil Aeronautics Board, the United States District Court in *Lichten* v. *Eastern Airlines, Inc.*, 87 F. Supp. 691, aff'd 189 F. 2d 939, summarized the law in stating (p. 697):

> "According to plaintiff's theory, any deviation from the contract or loss would make the valuation clause in the contract ineffective. If so, then the purpose of such a clause becomes reductio ad absurdum. If the carrier safely carries the cargo and delivers it to its owner at the termination of the journey, then a valuation clause is unnecessary. Only in case of a misdelivery, negligent in-

jury, loss or similar misfortune does a valuation clause come into use. Hence the Federal courts have rightly held that the limitation of liability clause is designed for and does survive a breach of the contract of carriage."

(c) The Decision of the Supreme Court of Idaho Undermines a Basic Purpose of the Interstate Commerce Act—Uniformity of Treatment of Shippers by Carriers

A basic purpose of the Interstate Commerce Act was to achieve uniformity of treatment of shippers by common carriers. In *George N. Pierce Co.* v. *Wells Fargo & Co.*, 236 U.S. 278, this Court, in upholding a limitation of liability provision similar to the one in this proceeding, stated (p. 284):

> "Since the act to regulate commerce and its amendments have gone into effect, cases of this character must be decided in view of the provisions of the commerce act and its requirement that the carrier shall file its tariffs and rates, which shall be open to inspection, and shall prescribe rates applicable to all shippers alike, thus to effect one of the main purposes of the law often declared by this court, to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances."

In the present proceeding, the filed tariff (and the Released Rates Order of the Commission) prescribed the limit of the carrier's liability as 30 cents per pound when no higher value was declared and the shipper paid no excess valuation charge. Under the tariff and the Commission's order, the shipper could have obtained a higher limit of liability by declaring a higher value and paying the excess valuation charge, but in no other manner. There is no provision in the tariff or in the Commission's order by which a carrier can

be held to a liability in excess of 30 cents per pound, if the shipper has not declared any excess valuation and has not paid any excess valuation charge. Thus, the Supreme Court of Idaho has introduced a concept of carrier liability which does not rest upon the filed tariff provisions. Under the theory of that decision, different shippers may recover damages from common carriers based upon different limits of liability, even though the shippers pay the same rates. Such differences in the treatment of shippers by carriers is made to depend, under that decision, only upon the interpretation of the nature and extent of the particular breach of contract involved. Such concept clearly is in derogation of the uniform treatment of shippers that the statute was intended to produce. *Kansas City Southern Ry. Co.* v. *Carl*, 227 U.S. 639, 652-653.

Moreover, the decision of the Supreme Court of Idaho is in direct conflict with the regulation of the Commission which implements the uniformity requirements of the statute by providing (49 C.F.R. 176.9, Appendix III): "Common carriers by motor vehicles of household goods shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs." The household goods carriers are thus under an injunction from the Interstate Commerce Commission to pay claims only in accordance with their tariffs, whereas the Supreme Court of Idaho has decreed a liability different from the tariffs. Discrimination cannot help but be the result of such directly conflicting instructions to the carriers.

(d) If Any Doubt Existed as to the Scope, Intent or Application of the Regulations or Orders of the Interstate Commerce Commission, or of the Tariff Rules Lawfully Filed With It, the Supreme Court of Idaho Should Have Referred the Questions to the Commission Under the Doctrine of Primary Jurisdiction

Without precedent and without a prior referral of the questions to the Interstate Commerce Commission, the Idaho Supreme Court has nullified a general order and basic regulation of the Interstate Commerce Commission and a tariff rule lawfully on file with the Commission.

The general order which has been nullified, at least in part, is Released Rate Order No. 362 (Appendix III, p. 28a). That Order specifically states that the limitations of liability therein prescribed for household goods carriers shall apply to "commodity rates for the transportation *and charges for accessorial services in connection therewith of household goods.*"

The Supreme Court of Idaho has declared that the Released Rates Order No. MC-362 (and the tariff rules published in accordance therewith) are not applicable in this case, because (Appendix I, p.):

> "It is implicit in the Commission's Released Rates Order No. MC-362, of May 24, 1954, to which we have hereinbefore referred, that the carrier must perform the accessorial service therein provided, if it be permitted to establish and receive the authorized charge upon which it is based; also, as evidenced by the order for service and the bill of lading, a shipment can be accepted for transportation and the charges exacted for the services contracted to be rendered, only in consideration of the carrier's promise to perform its covenant of transportation in the manner prescribed. It is also implicit in such contractual relationship that,

> if the carrier fails to perform its covenant and treats it as nonexistent, then it cannot limit its liability in the same manner as though it had performed, and the shipper is not bound by the terms of the covenant imposing limited liability."

There is no such implication evident in the language of the Commission's Released Rates Order. In fact, such implication runs counter to the very concept of limitation of liability, which comes into play only in the event of a breach of contract or a failure to perform the covenants. (The additional charge for the furnishing and packing of the barrel was, of course, refunded to the shipper, since that service was not performed. See Appendix IV, p. 33a).

Similarly, the regulation of the Commission (49 C.F.R. 176.9, Appendix III), which enjoins household goods carriers from assuming any liability in excess of that prescribed in their lawful bills of lading and tariffs, is nullified by the decision of the Idaho Court, because the bills of lading and tariffs of petitioner conform to Released Rates Order No. MC-362 and provide only a liability of 30¢ per pound when the shipper declares no higher valuation and pays no excess valuation charge.

Rule 3 of the tariff here involved (Appendix V) specifically states, in subparagraph (d): "The released value shall be deemed to relate to all *services* undertaken by the carrier or its agents." The decision of the Supreme Court of Idaho effectively nullifies this tariff rule by concluding that it does not apply to petitioner's undertaking to pack the hi-fi set in a barrel, since that undertaking was breached by petitioner.*

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* "Undertake"—"to put oneself under obligation to perform". *Webster's Third New International Dictionary, Unabridged*, G. & C. Merriam Company, 1961.

The decision of the Supreme Court of Idaho appears clearly to be erroneous, in the face of the express wording in the Regulations, in the Released Rates Order, on the bill of lading, and in the tariff rules. If, however, there is any possible doubt as to the intention of the Commission, with respect to the language used in its Orders and Regulations, then it is for the Commission to construe the scope, intent, and application of those Orders and Regulations, rather than for the Supreme Court of Idaho to do so by finding "implications"; and the same principle is equally true with respect to interpreting the tariff rules filed with the Commission.

The applicable judicial principle is that the Commission's own interpretation of its regulation or order is the ultimate criterion and is entitled to controlling weight, unless it is plainly erroneous or inconsistent with the regulation or order. In *Bowles* v. *Seminole Rock and Sand Co.*, 325 U.S. 410, this Court said (pp. 413-414):

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress or the principles of the Constitution in some instances may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

See also, *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554.

The Idaho Supreme Court in this proceeding must have been aware that its decision ran directly contrary to the plain meaning of the orders and regulations of the Interstate Commerce Commission and to the tariff rules filed with the Commission. But rather than referring the matter to the Commission for its expert interpretation of the scope and application of its own orders and regulations and of the tariff rules filed with it, the Court elected to impose its own interpretations by reading into the Commission's orders and regulations, and into the tariff rules, an "implicit" condition, in the complete absence of any indication that the Commission had ever intended such a condition.

Under circumstances where there is a reasonable doubt as to the meaning or intent of the language used by the Commission, this Court has stated that the proper procedure is for the Court before whom the case is pending to submit the issue of interpretation to the Commission.

In *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, involving a question of interpretation of tariffs on file with the Commission, on certiorari, this Court reversed the judgment of the Court of Claims and remanded the case to that Court with instructions that the matter be referred to the Interstate Commerce Commission for its interpretation. Similar action was taken by this Court in *United States* v. *Chesapeake & Ohio Ry. Co.*, 352 U.S. 77, in which a matter of tariff interpretation was remanded to the Court of Appeals on the issue of whether the matter was one within the exclusive primary jurisdiction of the Interstate Com-

merce Commission and should have been referred to that agency.

If there are reasonable grounds for questioning the scope and intent of the Commission's regulations governing the liability of household goods carriers (49 C.F.R. 176.9(a), Appendix III), or the Commission's Released Rates Order No. 362 (Appendix III), or the carrier's tariff rules filed with the Commission (Appendix V), then in conformance with the above precedents, certiorari should be granted in this proceeding, and the matter remanded to the Supreme Court of Idaho, with instructions to refer the matter of the interpretation of those regulations, orders, and tariffs to the Interstate Commerce Commission.

CONCLUSION

The decision of the Supreme Court of Idaho places in jeopardy the entire rate structure of the household goods carriers; it is directly contrary to the established and long-applied doctrine of released rates and limitations of liability under Sections 20(11) and 219 of the Interstate Commerce Act; it introduces uncertainty and discrimination in the treatment of shippers by carriers in contravention of the basic policy of uniformity established by the Interstate Commerce Act; and it deprives the Interstate Commerce Commission of the

primary jurisdiction with which it is vested in matters of this type. Therefore, certiorari should be granted.

Respectfully submitted,

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APPENDIX I

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9292

Pocatello, September Term, 1963

Filed Nov. 27, 1963
L. J. Bideganeta, Clerk

DONALD JOHNSON, *Plaintiff-Respondent*,

v.

BEKINS MOVING & STORAGE COMPANY, *Defendant-Appellant*.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Bannock County. Hon. Arthur P. Oliver, District Judge.

Action by plaintiff to recover value of equipment damaged in transit. Judgment for plaintiff, *affirmed*.

Maurice H. Greene, Boise, for appellant.

Robert C. Huntley, Jr., Pocatello, for respondent.

SMITH, J.

This appeal presents the issue whether appellant (defendant), a common carrier, effectively limited its liability for damage in transit to valuable hi-fidelity phonograph equipment (hereinafter sometimes referred to as a hi-fi set) delivered by respondent (plaintiff) to appellant for shipment in interstate commerce, and for its better protection appellant assessed and respondent paid an additional charge for "accessorial service," i.e., for special protective packing of the hi-fi set in a barrel.

Respondent, in his complaint, alleged that appellant contracted to transport respondent's household effects from Highland Park, New Jersey, to Pocatello, Idaho; that in particular appellant agreed specially to package respondent's hi-fi set; that as the result of appellant's failure to package and subsequent negligent handling of the set, it arrived damaged and broken. Respondent sought $555.00 damage which the parties stipulated was the value of the set. The balance of the complaint involves matters not material to this appeal.

The parties submitted the cause to the trial court on a stipulation of the facts. The court entered its findings of fact, conclusions of law, and judgment in favor of respondent and against appellant in the sum of $555.00, from which judgment appellant perfected this appeal.

The parties stipulated that appellant is a motor common carrier engaged in transportation of household goods in interstate and foreign commerce, under the provisions of 49 U.S.C.A. §§ 301-327, commonly known as Part II of the Interstate Commerce Act of 1887 (as amended); that the transportation performed by appellant was pursuant to a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act and in accordance with tariffs filed with the Interstate Commerce Commission pursuant to Section 317 of such Act, and the rules and regulations of the Interstate Commerce Commission promulgated thereunder.

The stipulation refers to the order for service which respondent placed with appellant for transportation of his household goods and effects. That instrument on appellant's printed Form HI;61 8-59 is entitled, "Order for Service, Confirmation of Order, Agreement for Service and Rate Quotation"; it contains certain provisions as follow:

> "The carrier shall be liable for physical loss of or damage to any articles from external cause while being

carried * * * in transit [exceptions are then listed which do not encompass respondent's high fidelity equipment].

* * *

"SUBJECT * * * to the further following limitations on the carrier's liability:

"(1) To 30¢ per pound of the weight of the lost or damaged article if the shipper has failed to make, in writing, any declaration of the value of the entire shipment (in which event the carrier will not be liable for breakage of of china [and similar goods listed] unless packed by the carrier or unless such breakage results from negligence of carrier); or

* * *

"(3) To the amount of actual loss or damage if shipper has declared in writing the full actual value of the entire shipment."

The foregoing, including Section (1), is also printed on the reverse side of the bill of lading, and inasmuch as respondent did not declare a value on the high fidelity equipment, appellant directs attention to the following provision which appears on the face of the bill of lading:

"NOTICE: Unless a different value for the entire shipment is declared in the paragraph below, the shipper hereby releases and declares the value and limits the liability of the carrier to not exceeding 30 CENTS PER POUND FOR EACH ARTICLE as provided in the contract terms and conditions printed on the reverse side hereof (See especially Section 1).

"Shipper hereby declares the value of the entire shipment to be $..... and hereby releases and limits value and liability of the carrier as provided in the contract terms and conditions printed on the reverse side hereof (See especially Section 1)."

The parties further stipulated that Household Goods Carriers' Bureau Agent, Tariff No. 78-B, MF-I.C.C. No. 90 (1959), a copy of which was submitted in evidence, was in effect at the time of shipment of respondent's goods; that Rule 3 of the tariff refers to the rates and charges based on Released Rates Order No. MC-362 of the Interstate Commerce Commission dated May 24, 1954. This order authorizes the motor carrier performing the specialized services of a Household Goods Carrier to establish and maintain commodity transportation rates and special charges for accessorial services in connection with household goods (See also Practice of Motor Common Carriers of Household Goods, 17 M.C.C. 467 (1939)). The order provides that a base transportation rate shall be applicable "when the shipper releases the value to an amount not exceeding thirty (30) cents per pound per article"; and also requires the request for services and the bill of lading have printed thereon in bold-face type:

> "Unless a different value is declared, the shipper hereby releases the value to 30 cents per pound for each article."

The special packing of the hi-fi set which respondent requested and appellant agreed to perform is referred to in Household Goods Carriers' Bureau Agent, Tariff No. 78-B, § 1, Item 105, under "Additional Services". For a barrel of not less than five cubic feet capacity, a charge of $8.00 is authorized.

The bill of lading which the parties executed has printed thereon the "contract, terms and conditions"; it also contains an "itemization of packing charges and special instructions," which inter alia recite one barrel at $8.00, such charge being included in the total freight charges for the shipment set forth in the bill of lading.

The stipulation recites that at the time the bill of lading was executed respondent requested and appellant agreed

to pack the hi-fi set in a barrel as stated in the bill of lading; that appellant did not pack the hi-fi set as it had agreed, and transported it as part of the household effects, without special packing of any kind; and that numerous items of the household effects, including the hi-fi set, were damaged in transit.

The parties agreed that the damage to the household effects, other than the hi-fi set, would be on the basis of the released rate valuation of 30 cents per pound in accordance with the terms of the bill of lading and appellant's tariff. This left for determination the sole issue of the amount to which respondent is entitled on account of the damage in transit to his hi-fi set.

The parties agreed that the actual damage to the hi-fi set was $555.00. Appellant refused to pay this sum and admitted liability in the amount of $15.00 based on the released valuation of 30 cents per pound.

The trial court in finding for respondent in effect adopted his theory of the case. It found that appellant contracted to transport respondent's household goods under a released rate tariff of 30 cents per pound; that the parties entered into a specific convenant (denominated a contract by the trial court) for special packaging of respondent's hi-fi set and that respondent paid a consideration therefor "in addition to the basic consideration of the contract, which latter consideration also flowed to the contract [convenant] for special packaging"; that appellant transported respondent's goods, and that the same, including the hi-fi set, were damaged and broken; that appellant settled respondent's claim for damages, exclusive of the hi-fi set, at the released rate of 30 cents per pound; and that the parties stipulated that damage to the hi-fi set was in the amount of $555.00.

The trial court concluded that the damage to the hi-fi set was proximately caused by appellant's negligence, and that appellant had br[illegible]ed its contract for the special

packaging of respondent's set. It then stated in Conclusion of Law No. IV:

> "That the contract [covenant] for special packaging of the hi-fi set and plaintiff's [respondent's] covenant to release his shipment at the released rate order were mutually dependent covenants, and the breach of the contract [covenant] for special handling was the direct and proximate cause of plaintiff's damages."

It further held in Conclusion of Law No. V, that the contract [covenant] for special packaging was not violative of either the federal statutes or the Interstate Commerce Commission regulations and did not prefer one shipper over another.

This Court accepts appellant's theory that there is but one contract involved in this case. The terminology used by the trial court in its findings, to the effect that there was one contract for shipment of the goods and another for the special accessorial service, appears to have been the reason for appellant's assignments that the trial court committed error in finding that there were two contracts. However, in Conclusion of Law No. IV, the trial court recognized the existence of but one contract between the parties, which contained appellant's covenant for the special packaging of the hi-fi set, and respondent's covenant to release the shipment at the released rate, and that they were mutually dependent covenants of the one contract.

Appellant's principal specifications of error attack Conclusion No. IV set out above, and the judgment of $555.00 in favor of respondent, representing the amount of stipulated actual damage to the hi-fi set. It contends that respondent is entitled to recover the amount of $15.00 based upon the released rate tariff of 30 cents per pound.

Appellant's position in effect is that while it admits failure to perform the contracted service under the special

covenant, since it did not package the hi-fi set in a protective container (accessorial service), and admits the damage in transit, that notwithstanding its failure so to perform, it cannot be subjected to liability in excess of the released value; also, that it can fail to perform its special covenant, without liability attaching beyond 30 cents per pound, in the absence of a declaration of value by the shipper.

An examination of the contract between the parties for the service, the bill of lading, the applicable tariff, the provisions of the Interstate Commerce Act, and the regulations of the Interstate Commerce Commission indicates clearly their predication upon a carrier's performance of the contracted services; and that if, upon performance, the shipper sustains loss or damage, then, and only then, is the carrier's liability limited to the released value of 30 cents per pound, unless the shipper has declared a different value. The limitation of liability is not predicated upon the carrier's utter disregard of its covenant to perform. Our analysis of appellant's contentions, to which we hereinafter refer, lends further assurance that the conclusions we have reached are correct.

Appellant refers to Part II, sec. 217(a) of the Interstate Commerce Act, 49 U.S.C.A. § 317 (1940), which requires an interstate motor vehicle common carrier to file with the Commission and to print and keep open for public inspection tariffs showing all rates, fares and charges for transportation, and "all services in connection therewith." Appellant also refers to Commission Rule No. 4 (17 M.C.C. at 505-6) which requires that the tariffs establishing charges for accessorial services "shall separately state each service to be rendered and the charge therefor"; also, that the "rate for transportation of such goods shall not include the charge for any accessorial service," and that "no such services other than those for which separate charges have been so established shall be rendered by any such carrier."

Appellant, in arguing that the tariff provisions fixing liability for loss or damage are binding upon both appellant and respondent, cites Part II, sec. 217(b)(d) of the Interstate Commerce Act which forbids the carrier from (1) charging a different compensation for transportation or for any service in connection therewith, except as specified in the tariff then in effect; (2) extending to any person privileges or facilities for transportation in interstate foreign commerce except as specified in its tariffs; and (3) providing that no contract, tort, or other conduct of the carrier and shipper can change the specified rate; citing Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S.Ct. 47 (1922); Chicago & A. R. Co. v. Kirby, 225 U.S. 155, 56 L.Ed. 1033, 32 S.Ct. 648 (1916); Atchinson, T. & S. F. Ry. Co. v. Springer, 172 F.2d 346 (7th Cir. 1949); Louisville & N. R. Co. v. Dickerson, 191 Fed. 705 (6th Cir. 1911); Pennsylvania Railroad Company v. Greene, 178 F.Supp. 657 (S.D. Ala. 1959); Oregon-Washington R. & Nav. Co. v. C. M. Kopp Co., 12 Wn.2d 146, 120 P.2d 845 (1942); Jones v. Northwest Airlines, 22 Wn. 2d 863, 157 P.2d 728 (1945); Annot., 138 A.L.R. 633 (1942).

In the case at bar appellant complied with sec. 217(b) of the Interstate Commerce Act by charging and receiving the accessorial fee for the special packaging of respondent's hi-fi set. Appellant transported the set, however, without having performed its covenant for special packaging. Since appellant did not perform its covenant for the accessorial service it agreed to provide, the rules of the cases which it cites cannot be used in support of its position.

In attempting further to uphold its position, appellant refers to certain other provisions of the Household Goods Carriers' Bureau Agent, Tariff No. 78-B, particularly to Rules 1 and 3 thereof. The referred to provisions limit the carrier's liability to 30 cents per pound of the lost or damaged article carried or held in storage in transit, where

the shipper fails to declare the value of the entire shipment in writing. It is implicit in these rules that if such provisions be applied, the services contracted for must be performed. For instance, Rule 1(a) provides in effect for transportation of the property. Rule 1(b) provides that the reduced rates in the tariff are conditioned upon the use of the standard household goods bill of lading, but that the shipper may elect not to accept its terms, and, in lieu thereof, have the property transported subject to the carrier's common law liability, in which event the rate charged shall be 100% higher than the tariff rate which would apply if the shipment be transported at the released value. Rule 3(d) specifically states that the released value shall be deemed "to relate to all services undertaken by the carrier or its agent", which by clear implication includes additional accessorial protective services when contracted for. Again, the Rules contemplate performance of all transportation services as contracted, if the carrier be allowed to limit its liability.

Here, "all services undertaken by the carrier" were not performed, since appellant breached its covenant for protective packaging and treated it as nonexistent. In such a case, the limitation on liability applicable when released rates for accessorial service are charged has no such force and effect. Appellant cannot have the benefit of the additional charge and still seek to limit its liability when there was failure even to perform.

Appellant advances a reason why the rates and charges for household goods must be based on some kind of valuation formula, i.e., "that a household goods carrier never knows the actual value of the goods being transported." Appellant points out that household goods and personal effects may include valuable dishes, paintings, silverware and other articles of high value, the existence of which is not known to the carrier; that, therefore, the Interstate Commerce Commission has permitted carriers of house-

hold goods to publish tariffs based on released rate valuations "unless the shipper is agreeable to disclosing the actual value of the goods being transported and the carrier permitted to charge accordingly because of the increased liability it incurs."

Appellant's contentions have no application under the facts disclosed herein, simply because the kind and character of the property offered by respondent for shipment, to-wit a high fidelity phonograph set, was known to the carrier, and respondent requested that it be packaged in a special protective container. While its actual value may not have been disclosed, nevertheless it must be deemed to have been much greater than the released value of 30 cents per pound. It is axiomatic that if equipment so disclosed was not valuable or of delicate nature, there would have been no need for special protective packaging.

Appellant argues that the carrier is permitted to charge accordingly as its increased liability occurs. This is precisely what appellant did, when it received the additional charge conditioned upon its promise to perform its covenant for protective packaging.

Our review of the pertinent federal statutes, regulations, rules, and usages thereunder leads to the conclusion that the interpretations urged by appellant cannot be accepted. We are not here concerned with a limitation on liability applicable to property damaged in transit upon which the value was not declared; but rather with appellant's failure to pack a piece of equipment in a special protective manner, which it had promised to do in consideration of the additional charge which respondent paid therefor. The provisions of the Interstate Commerce Act, Part I, § 20(11), 49 U.S.C.A. § 20(11) (1940), limiting liability are not applicable in such a situation.

Appellant cites Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 67 L.Ed. 183, 48 S.Ct. 47 (1922), and Texas & P. R. Co. v. Mugg & Dryden, 202 U.S. 242, 50 L.Ed. 1011, 26 S.Ct. 628 (1906), as authority for the proposition that

a carrier's published tariff is for all purposes the legal rate, and that the rights of the parties as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier or a third party. The first cited case involved a rate charged in lesser amount, and the second case, a rate charged in greater amount than the published tariff by the carrier for the transportation of property. No covenant providing for special protection, nor disregard of any such covenant, was involved in either case; nor was any theory involved of the carrier's negligence, where it had accepted property for transportation knowing the kind and character of the property involved and the necessity for its special packaging for transit.

Appellant cites Pennsylvania Railroad Company v. Greene, 173 F.Supp. 657 (S.D. Ala. 1959), to the effect that a bill of lading and the tariff have the force of a statute and cannot be varied under any pretext. A railroad carrier commenced that action to recover its freight charges from a shipper of three carloads of bananas, the shipments having been accompanied by defendants' caretaker. Defendants counterclaimed, alleging that the bananas had been damaged by chilling in transit. The court pointed out that the responsibility for protection of the bananas in transit was assumed by defendants through their caretaker in charge, pursuant to the provisions of a certain protective tariff; and that the furnishing of the caretaker relieved the carrier from liability for damage to the bananas in transit. Implicit in the holding of this case is the theory that, in the absence of any covenant for protective service, the carrier must still furnish such service as may be reasonably required to protect the shipment where the carrier has knowledge of the kind of goods being shipped.

In Watson Bros. Transp. Co. v. Feinberg Kosher Sausage Co., 193 F.2d 283 (8th Cir. 1951), hereinafter sometimes referred to as the Watson case, appellee Feinberg was awarded damages against appellant Watson Bros., a

motor vehicle common carrier which afforded refrigeration service on its trucks. The carrier had previously transported several loads of the shipper's meat products and delivered them at destination in good condition. The shipper then delivered other meat in good condition to the carrier, which was spoiled upon arrival at an interstate destination due to the fact that the carrier did not refrigerate the meat during a portion of the trip en route. The carrier disclaimed any liability by virtue of a tariff provision which read: "Rates or ratings provided on freight requiring protection from heat or cold do not obligate the carrier to provide refrigeration, heater service or vehicle specially equipped for such protection, except as otherwise provided in carrier's tariffs"; also, because it, the carrier, "did not have a duty to refrigerate these shipments in the absence of a specific request by plaintiff (shipper) on the bill of lading"; and that it had used the degree of care required in transportation.

The judgment in the Watson case, which the appellate court affirmed, was based on the theory that the carrier did not exercise reasonable care in protecting the shipment, and that the absence of a request for refrigeration on the bill of lading did not limit the carrier's common law responsibility to exercise due care. The appellate court pointed to the clause of the tariff which provided that the rate charged included the cost of protecting the shipment from damage by heat or cold, "providing that the shipper states specifically on the bill of lading that such protection is required."

The carrier contended that the requirement, that the shipper note on the bill of lading any necessity for refrigeration, was reasonable, in order that the carrier be able to select from the shipments tendered to it those which actually needed refrigeration. The court pointed out, however, that "that argument goes to the question of the reasonableness of such a requirement and whether the carrier in a given instance exercised reasonable care in determining

whether a particular shipment needed refrigeration." The court then upheld the judgment of the trial court in favor of recovery to the shipper *on the theory that the kind and character of the shipments were self-identified*, i.e., perishable, which imparted notice to the carrier of the nature of the property accepted for transportation, with the requisite imposition on the carrier of the duty to exercise due care for protection of the shipment. In that regard the court said:

> "If the boxes containing the products involved in the two shipments in question had not been prominently identified as perishables and needing refrigeration, and if the bills of lading themselves had not described the nature of the products constituting the shipments, in the absence of other facts imparting notice of the perishable nature of the shipments, appellant might have successfully argued to the trier of the facts that it did not fail to exercise ordinary care in not discovering that the shipments needed refrigeration. * * *
>
> * * *
>
> "Appellant contends that the failure of the shipper to request refrigeration constituted a notice or instruction to the carrier that no such service was needed. But that argument is inconsistent with the intent of the tariff * * * and is directly contradicted by the agreement between the shipper and appellant's freight solicitor that refrigeration would be furnished." 193 F.2d at 287.

The case at bar presents a more cogent set of facts consonant with recovery from the carrier (appellant) than does the Watson case, although the two are quite similar. In both cases the character of the property offered for transportation was self-explanatory,—in the case at bar special equipment which required care in handling, and in the Watson case, meat products which required refrigeration.

in warm weather. In the case at bar the request for special packaging to protect the property offered for transportation was written on the bill of lading; in the Watson case it was not. Nevereheless, such omission was held not to have released the carrier from its obligation to exercise reasonable care in the protection of the shipment. In the case before us the notation on the bill of lading requesting protective packaging of the hi-fi equipment, and the carrier's recognition, in the tariff and in the bill of lading, of its convenant to include such packaging, constituted written recognition of the carrier's existent obligation to exercise the requisite degree of care commensurate with the known nature of the shipment, i.e., to pack the equipment in a special container and thus protect it from harm.

In the Watson case, a limitation on the carrier's liability was not in issue, whereas it is in the instant case. However, the rule of that case, imposing full liability in the absence of strict adherence to the statutory language, is extended in Loeb v. Friedman's Express, 187 Misc. 89, 65 N.Y.S.2d 450, *aff'd*. 271 App. Div. 873, 66 N.Y.S. 2d 634, *appeal dismissed*. 271 App. Div. 916, 67 N.Y.S. 2d 690, *aff'd*, 296 N.Y. 1029, 73 N.E. 2d 906, *cert. denied*, 331 U.S. 851, 91 L.Ed. 1859, 67 S.Ct. 1743 (1946), wherein was presented the question whether the carrier had effectively limited its liability where the shipper had not declared the value of the goods in writing, the form therefor having been left blank.

"While the rationale of the New York court in the Loeb case and of the courts in American Ry. Express Co. v. Lindenburg, 260 U.S. 584, 67 L.Ed. 414, 43 S.Ct. 206 (1923), and Paramount Dress Co. v. Kirby & Kirby, 167 Pa. Super. 524, 76 A. 2d 432 (1950), would be highly persuasive in the respect that a valid limitation on liability does take place when the shipper agrees in writing to the quoted freight charges appearing on the order for service and the bill of lading, we distinguish the case at bar from

those decisions. None of them dealt with the precise and, indeed, the unique question of the effect to be given a special covenant in determining whether a carrier had effectively limited its liability for the damage in transit to the shipper's goods. This special covenant—for the protective packaging of respondent's hi-fi set—which respondent specifically requested and appellant specifically agreed to perform upon receipt of an additional charge, is the precise ground upon which we affirm the decision of the trial court.

It is implicit in the Commission's Released Rates Order No. MC-362, of May 24, 1954, to which we have hereinbefore referred, that the carrier must perform the accessorial service therein provided, if it be permitted to establish and receive the authorized charge upon which it is based; also, as evidenced by the order for service and the bill of lading, a shipment can be accepted for transportation and the charges exacted for the services contracted to be rendered, only in consideration of the carrier's promise to perform its covenant of transportation in the manner prescribed. It is also implicit in such contractual relationship that, if the carrier fails to perform its covenant and treats it as nonexistent, then it cannot limit its liability in the same manner as though it had performed, and the shipper is not bound by the terms of the covenant imposing limited liability.

As hereinbefore stated, the applicable tariffs and other regulations of the Interstate Commerce Commission do not permit appellant the benefit of both the additional charge and the limitation on liability when there is failure to perform special accessorial services for which the parties have contracted.

The judgment of the trial court is affirmed. Costs to respondent.

KNUDSON, C. J., and McQUADE, McFADDEN and TAYLOR, J. J., concur.

On Denial of Petition for Rehearing
(Denied February 12, 1964)

SMITH, J.

Appellant, in its petition for rehearing, points out that it remitted to respondent the special service charge of $8.00 for the protective packing of respondent's hi-fi set. It then contends that the Court is amiss in stating:

> "[the] applicable tariffs and other regulations of the Interstate Commerce Commission do not permit appellant the benefit of both the additional charge and the limitation on liability when there is failure to perform special accessorial services for which the parties have contracted."

Appellant misconstrues the import of this statement.

The mere formality of refunding the charge for the protective accessorial service, after failing to perform the service is not material, since appellant admits that if it did not refund the charge, "it would have been liable to respondent for that amount as an overcharge." When the parties first executed the contract for the transportation of respondent's household goods, which included the covenant for performance by appellant of the accessorial service, appellant became entitled to the benefit of limitation of its liability upon performance of the covenant, had there not been a showing of the "carrier's utter disregard of its covenant to perform."

The parties, themselves, placed no importance on the fact that appellant remitted to respondent the $8.00 charge for the accessorial service. Mention thereof appears only in the stipulated facts and in appellant's statement of the evidence. Except perhaps by inference, it was not incorporated into appellant's assignments of error; nor was it

argued by either party on appeal, nor were authorities cited in support of any legal significance attributable thereto. Such contention cannot be considered when raised for the first time in a petition for rehearing. Supreme Court Rule 41; Jewett v. Williams, 84 Idaho 93, 369 P. 2d 590 (1962).

Appellant further insists that the contract between the parties is indivisible and, as controlled by 49 U.S.C.A. § 20(11), cannot be "vivisected" to provide for a limitation on liability as to one covenant and full liability as to another covenant within the same contract.

The contract contains independent covenants for which separate considerations were charged and paid. One covenant provided for transportation of respondent's household goods; the other covenant for special protective packing of his hi-fi set. When there are several covenants for performance under one contract and money considerations are apportioned and paid for each, the covenants are severable and independent. Huggins v. Green Top Dairy Farms, 75 Idaho 436, 273 P. 2d 399 (1954); Warm River Lumber Co. v. Rightenour, 67 Idaho 187, 174 P. 2d 940 (1946); Durant v. Snyder, 65 Idaho 678, 151 P. 2d 776 (1944). As hereinbefore mentioned, appellant failed to perform the special covenant for protective packing of the hi-fi set. Appellant thereupon cannot contend that its liability under such special covenant became limited in the same manner as though it had been performed; nor as under the covenant providing for transportation of the household goods.

It is also argued that the decision of the New York Courts in Loeb v. Friedman's Express, 187 Misc. 89, 65 N.Y.S. 2d 450, *aff'd*, 271 App. Div. 873, 66 N.Y.S. 2d 634, *appeal dismissed*, 271 App. Div. 916, 67 N.Y.S. 2d 690, *aff'd*, 296 N.Y. 1029, 73 N.E. 2d 906, *cert. denied*, 331 U.S. 851, 91 L.Ed.

1859, 67 S.Ct. 1743 (1946), is contra to that of the United States Supreme Court in American Ry. Express Co. v. Lindenburg, 260 U.S. 584, 67 L.Ed. 414, 43 S.Ct. 206 (1923) and cannot properly be used in support of the conclusions reached in the case at bar. See also the later case of Paramount Dress Co. v. Kirby & Kirby, 167 Pa. Super. 524, 76 A. 2d 432 (1950), approving the Loeb decision. In view of the extensive history of the Loeb case in the courts of New York and the United States Supreme Court, we do not concur with that contention.

The petition for rehearing is denied.

KNUDSON, C.J., MCQUADE, MCFADDEN and TAYLOR, J.J., concur.

APPENDIX II

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Civil No. 22775

DONALD JOHNSON, *Plaintiff*,

v.

BEKINS MOVING AND STORAGE COMPANY, *Defendant*.

Memorandum Opinion

The above entitled matter is before the Court on stipulated facts. Each of the parties having briefed the law questions involved.

It appears from the stipulation of facts and the exhibits attached thereto that in the year 1960 plaintiff had requested services of the defendant for the transportation of plaintiff's household goods from New Jersey to the state

of Idaho. Contracts were entered in to, by the terms of which the plaintiff ordered the services of defendant for the released rate of 30¢ per pound, and in addition plaintiff contracted with defendant for special handling of one hi fi set, for which special handling plaintiff paid additional compensation to the defendant. Subsequent thereto the furnishings of plaintiff were damaged. The damages of which the Court is concerned being limited to the hi fi set which has an agreed value of $555. Negligence on the part of the defendant which was the proximate cause of plaintiff's damages is admitted. The question for the court's decision being whether the plaintiff is bound by the released rate of 30¢ per pound, or whether plaintiff can in fact recover actual value of the hi fi set in the amount of $555.

At the outset the Court agrees with that portion of defendant's position wherein the defendant alleges that any contract which prefers one shipper over another is void as being prohibited by the I. C. C. regulations. However, the Court is of the opinion that a contract to handle certain items specially, supported by consideration, is a contract separate and apart from the rate provisions of the I. C. C. regulations, is not contrary thereto and is not a preference as contemplated by I. C. C. regulations.

In the present case we have a specific contract between plaintiff and defendant for special handling of plaintiff's hi fi set. This contract is supported by consideration not only for the extra charges made by defendant to plaintiff for this special handling, but also supported by the mutual dependent promises entered into between defendant and plaintiff with reference to the released rate charges. The breach of this contract for special handling was the direct and proximate cause of plaintiff's damages. The Court is, therefore, of the opinion that the plaintiff have and recover from the defendant the agreed value of the hi fi set in the amount of $555.

Counsel for plaintiff will prepare Findings of Fact and Conclusions of Law, unless waived, together with Judgment in conformance herewith. Copies to counsel, original to the Court.

DATED: October 30, 1962.

ARTHUR P. OLIVER
District Judge

Copy to:

RACINE & HUNTLEY
MAURICE H. GREEN.

SARAH DEVANEY, *Clerk Dist. Court*

By JESSIE SPENCER
Deputy Clerk

Civil No. 22775

Findings of Fact, and Conclusions of Law

The above cause having come on regularly for consideration by the Court upon stipulated facts and documentary evidence submitted by the respective parties, Robert C. Huntley, Jr. appearing for plaintiff and Maurice H. Greene appearing for defendant, and the Court having considered the stipulated facts and documentary evidence and the briefs of counsel, and the matter having been fully submitted and the Court being fully advised in the premises, the Court finds and decides as follows:

FINDINGS OF FACTS

I.

That on August 12, 1960, the plaintiff placed an order for service with the defendant for the defendant to transport plaintiff's household goods from Highland Park, New Jersey to Pocatello, Idaho, under a released rate tariff of 30 cents per pound.

II.

That plaintiff and defendant entered into a specific contract for special packaging of plaintiff's hi-fi set, for which contract an additional consideration was paid in addition to the basic consideration of the contract, which latter consideration also flowed to the contract for special packaging.

III.

That the defendant breached its contract for special packaging of the hi-fi set and did not provide any special packaging for the hi-fi set.

IV.

That the defendant, pursuant to said contracts, shipped plaintiff's goods and as a result of negligence on the part of defendant or connecting shippers the negligence of whom is attributable to defendant, plaintiff's household goods, including the hi-fi set, were damaged and broken and plaintiff submitted a claim and the parties settled the claim for all damages, exclusive of those to the hi-fi set, at the released rate of 30 cents per pound.

V.

That the parties stipulated that the damages to the hi-fi set were of an agreed sum of $555.00 and that compensation for the damages to the hi-fi set under the released rate order would be the sum of $15.00, with the defendant admitting liability to the plaintiff in the latter amount.

Conclusions of Law

From the above and foregoing Findings of Fact the Court concluded as follows:

I.

Judgment should be entered in favor of plaintiff and against defendant in the sum of $555.00 as and for compensation for damages to plaintiff's hi-fi set.

II.

That the damages to plaintiff's hi-fi set were solely and proximately caused by negligence of the defendant.

III.

That the defendant breached its contract for special packaging of the plaintiff's hi-fi set.

IV.

That the contract for special packaging of the hi-fi set and plaintiff's covenant to release his shipment at the released rate order were mutually dependent covenants and the breach of the contract for special handling was the direct and proximate cause of plaintiff's damages.

V.

That the contract for special packaging of the hi-fi set is a valid contract which does not violate either the federal statutes, or the Interstate Commerce Commission regulations pursuant thereto, covering interstate shipment of household furnishing and the contract for special packaging of the hi-fi set did not violate said statutes and regulations by preferring one shipper over another.

VI.

That the plaintiff is entitled to judgment for his court costs in the sum of $20.95.

DATED this 1 day of November, 1962.

ARTHUR P. OLIVER
District Judge.

APPENDIX III

Interstate Commerce Act, Part I, Title 49 U.S. Code, Section 20 (11)

(11) That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent

foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon;

and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination, and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided.

Interstate Commerce Act, Part II, Section 217, Title 49. U.S. Code, Section 317

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of sections 1 (7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting

such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) No common carrier by motor vehicle, unless otherwise provided by this part, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part.

Interstate Commerce Act, Part II, Section 219, Title 49, U.S. Code, Section 319

The provisions of section 20(11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

General Regulations of the Interstate Commerce Commission. Code of Federal Regulations. Title 49. Part 176—Transportation of Household Goods

Section 176.9 *Liability of carriers.*

(a) *Liability restricted.* Common carriers by motor vehicle of household goods shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs.

INTERSTATE COMMERCE COMMISSION

RELEASED RATES ORDER NO. MC-362

APPLICATION NO. MC-573 UNDER SECTIONS 20(11) AND 219 OF THE INTERSTATE COMMERCE ACT

PRESENT: J. Haden Alldredge, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

The Commission having been petitioned by Household Goods Carrier's Bureau on behalf of motor common carriers for whom it acts as tariff publishing agent, for authority to establish and maintain rates for the transportation of household goods dependent upon released value and the said application having been considered and good cause appearing therefor:

It is ordered, That subject to the conditions specified in succeeding paragraphs hereof, each motor common carrier performing the specialized service of a household goods carrier be, and it is hereby, authorized to establish and maintain by filing and posting in the manner required by the Interstate Commerce Act, commodity rates for the transportation and charges for accessorial services in connection therewith of household goods, as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, said rates and charges to be applicable only

when the released value of the property declared by the shipper is as follows:

Released Values and Liability Limitations	Transportation Rate Basis	Storage in Transit Rate Basis
When the shipper releases the value to an amount not exceeding thirty (30) cents per pound per article.	Base transportation rate.	Base storage rate for the first 60-day period of storage. Thereafter, base storage rate plus a value charge of 10 cents per $100.00 or fraction thereof, for each storage period of 30 days, or fraction thereof. The storage value charge shall be computed on value determined on the basis of the actual weight of the shipment, minimum 1,000 pounds at 30 cents per pound.
When the shipper releases the value to a lump sum for the entire shipment. If the released value on the entire shipment is less than the actual cash value of the shipment, the carrier's liability shall be limited to (1) that proportion of the actual loss or damage represented by the percentage that the released value bears to the actual cash value of the shipment, or (2) the amount of actual loss or damage not exceeding thirty (30) cents per pound of the gross weight of each shipping package or loose article not enclosed in a shipping package, whichever is greater. Only one of the alternative methods shall be used to determine the total liability. The total parts comprising any article knocked down or taken apart for handling or loading shall constitute one article for the purpose of determining carrier's liability as provided above.	Base transportation rate plus a valuation charge of 50 cents for each $100.00 or fraction thereof of the declared value of the entire shipment.	Base storage rate for first 60-day period of storage. Thereafter base storage rate plus a value charge of 10 cents per $100.00 or fraction thereof for each 30-day period or fraction thereof.

It is further ordered, That changes may be made in the rates or charges established under the authority of this order, but the released values provided herein may not be decreased, nor may the value charges as specified herein be increased without the specific authority of the Commission.

It is further ordered, That the order for services and the bill of lading issued for any shipment accepted for transportation and storage at released rates established and maintained under the authority of this order, shall have printed in a distinctive color in bold-face type on the face thereof a statement reading substantially as follows:

> "Unless a different value is declared, the shipper hereby releases the value to 30 cents per pound for each article."

And it is further ordered, That tariffs containing charges established under the authority of this order shall show in connection therewith the following notation:

> Rates or charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. MC-362 of May 24, 1954, subject to complaint or suspension.

This order does not constitute authority for the establishment of released rates or charges on any description of traffic or over the line of any carrier or other than as herein specifically indicated.

The Commission does not hereby approve the lawfulness, except under Sections 20(11) and 219 of the Interstate Commerce Act, of any rates or charges which may be filed under the authority of this order.

Dated at Washington, D. C., this 24th day of May, 1954.

By the Commission, Commissioner Alldredge.

GEORGE W. LAIRD
Secretary

(SEAL)

APPENDIX IV

Civil No. 22775

Stipulation of Facts

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys of record, that in addition to the admissions contained in the pleadings, the following facts in the above-entitled action are true and correct:

On August 12, 1960, the plaintiff placed an order for service with the defendant for the defendant to transport plaintiff's household goods from Highland Park, N. J., to Pocatello, Idaho. The order for service is attached hereto as Exhibit 1. The signature of the plaintiff in the lower lefthand corner of the exhibit has been partially torn from the form. On the 17th day of August, 1960, the plaintiff delivered to the defendant the household goods for transportation by the defendant. At that time the parties signed a bill of lading covering the transportation. Attached hereto as Exhibit 2 is the printed form of the bill of lading signed by the parties. The original copy of the bill of lading has been lost. Attached hereto as Exhibit 3 is the No. 4 carbon copy of the original bill of lading. Exhibit 3 is an identical duplicate of the original bill of lading, except that it does not contain the signature of the parties and does not have printed on the reverse side thereof the "Contract terms and conditions" that appeared on the reverse side of the original bill of lading, the same as they appear on sheet 1 of Exhibit 2. At the time of the execution of the original bill of lading, the plaintiff requested the defendant and the defendant promised and agreed to pack one of the items of household goods, a hi-fi set, in a barrel. The packing specified by the plaintiff and which the defendant agreed to perform is set forth in the box in the center of Exhibit 3. The defendant did not pack the hi-fi set in a barrel, and the same was transported as a part of the shipment of household goods without packing

of any kind, other than the use of ordinary pads and blankets. The shipment of household goods weighed 1,750 lbs. and was transported by the defendant by motor vehicle from Highland Park, N. J., to Pocatello, Idaho, and there delivered to the plaintiff about August 25, 1960.

The defendant is a motor common carrier engaged in the transportation of household goods in interstate and foreign commerce under the provisions of Title 49, U. S. Code, commonly known as Part II of the Interstate Commerce Act (Secs. 301 to 327, as amended). The transportation performed by it is under a certificate of convenience and necessity issued by the Interstate Commerce Commission under said Federal Motor Carrier Act and in accordance with tariffs filed with the Interstate Commerce Commission pursuant to section 317 of such Act and rules and regulations of the Interstate Commerce Commission promulgated thereunder. The tariff of the defendant in force and effect at the time the shipment of plaintiff's household goods was transported by defendant was Household Goods Carriers' Bureau Agent, Tariff No. 78-B, MF-I.C.C. No. 60, a true copy of which tariff is attached hereto as Exhibit 4. Paragraph (e) of Rule 3 of the tariff refers to the rates and charges in the tariff being based on Released Rates Order No. MC-362 of the Interstate Commerce Commission dated May 24, 1954. Exhibit 5 is a true and correct copy of the released rate order of the Interstate Commerce Commission referred to in Rule 3(e) of the tariff.

At the time the household goods were delivered to the defendant at Pocatello, Idaho, it was found that numerous of the items of household goods had been damaged in transit. The plaintiff accepted delivery of the household goods in damaged condition and the parties executed Part 3 of the bill of lading form attached hereto as Exhibit 2, attaching to the claim form a list of the items damaged and the amounts claimed therefor. Attached hereto as

Exhibit 6 is the claim form executed by the parties at the time the household goods were delivered and the list of damaged articles. Thereafter the parties agreed that the damage to all of the household goods, other than the hi-fi set above referred to, based on a released rate value of 30 cents per pound in accordance with the terms and conditions of the original bill of lading and the tariff of the defendant on file with the Interstate Commerce Commission, amounted to the sum of $272.35, which sum was paid by the defendant to the plaintiff subsequent to the institution of this action. This payment leaves for determination by the court only the amount of damages due plaintiff from defendant on account of the damage to the hi-fi set.

The parties agree the actual damage to the hi-fi set was $555.00. The hi-fi set weighed 50 lbs. Computed at the released rate valuation of 30 cents per pound provided in the bill of lading and tariff of the defendant, the damage would amount to the sum of $15.00. The defendant has refused to pay the sum of $555.00 to the plaintiff, but has offered to pay to defendant the released rate valuation of the hi-fi set at 30 cents per pound or $15.00, and admits liability to the plaintiff in that amount.

After the defendant discovered, in delivering the household goods to plaintiff at Pocatello, that it had failed and neglected to pack the hi-fi set in a barrel and had failed to pack certain other items specified to be packed in the original bill of lading, the defendant refunded to the plaintiff the charges theretofore made by it for such packing. Attached hereto, marked Exhibit 7, is a photo copy of the check issued by the defendant to the plaintiff in refund of the packing charges, the refund covering, among other items, the packing charge for the barrel in which the defendant had agreed to pack the hi-fi set at the time of shipment.

This cause is hereby submitted to the Court for final decision on the merits and order of the Court setting the

cause for trial on the merits on August 1, 1962, may be vacated.

Subject to the approval of the Court, the parties agree that the plaintiff may have 20 days from the date of filing of this stipulation to file his opening brief, the defendant having 20 days thereafter in which to answer plaintiff's brief, and plaintiff 10 days thereafter in which to reply if he so desires.

DATED AND SIGNED this 31st day of July, 1962.

ROBERT C. HUNTLEY,
Attorney for Plaintiff

MAURICE H. GREENE.
Attorney for Defendant.

APPENDIX V

Household Goods Carriers' Bureau, Agent, Tariff No. 78B. MF-I.C.C. No. 90

Rule 3—*Declaration of Value*

(a) Shippers are required to state specifically, in writing, the agreed or declared value of the entire shipment, except as provided in paragraph (b).

(b) If shipper fails to declare the value of the entire shipment in writing upon the bill of lading, the liability of the carrier for loss or damage to any article carried or held in storage in transit pursuant to this tariff shall be released and limited to 30¢ per pound of the weight of the lost or damaged article.

(c) If the released value on the entire shipment is less than the full actual cash value of the entire shipment, the liability of the carrier for loss or damage (whether or not

loss or damage occurs from negligence) shall be released and limited to either:

1. That proportion of the actual loss or damage represented by the percentage that the released value bears to the actual cash value of the shipment, OR,

2. The amount of actual loss or damage not exceeding 30¢ per pound of each shipping package or loose article not enclosed in a shipping package,

whichever may be greater, as related to the total claim. Only one of the alternative methods shall be used to determine the total liability.

(d) The released value shall be deemed to relate to all services undertaken by the carrier or its agents.

(e) Rates and charges herein based on released value have been authorized by Interstate Commerce Commission in Released Rates Order No. MC-362 of May 24, 1954, subject to complaint or suspension.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 71

BEKINS MOVING & STORAGE COMPANY, PETITIONER

v.

DONALD JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's request for the views of the Interstate Commerce Commission on the issues presented in the petition for a writ of certiorari.

STATEMENT

This case arises out of an action for damages instituted in a State court in Idaho by respondent Donald Johnson against petitioner Bekins Moving & Storage Company ("Bekins"). The trial judge awarded Johnson actual damages, rejecting the carrier's argument that its liability was limited by a tariff filed with the Interstate Commerce Commission pursuant

747-575—64

to a released rates order, and the Supreme Court of Idaho affirmed. The pertinent facts, which were stipulated, are as follows.

Johnson contracted with Bekins to transport household goods from Highland Park, N.J., to Idaho State College at Pocatello (Pet. 31a). At the time of the execution of the bill of lading, Johnson requested and Bekins "promised and agreed to pack one of the items of household goods, a hi-fi set, in a barrel" (Pet. 31a). Johnson paid an additional charge of $8 for the protective packing service (Pet. 4), but the carrier "did not pack the hi-fi set in a barrel, and the same was transported * * * without packing of any kind, other than the use of ordinary pads and blankets" (Pet. 31a–32a). The hi-fi set was damaged in transit, and the amount of actual damages was stipulated to be $555 (Pet. 33a).

Bekins admitted responsibility for the loss, but contested the amount of damages, contending that its liability was limited to $15 by a tariff filed with the Interstate Commerce Commission and in effect at the time of the shipment (Pet. 32a, 33a). The tariff provided that unless the shipper declared the value of a shipment in writing on the bill of lading (and paid a higher rate)—which Johnson did not do—"the liability of the carrier for loss or damage * * * shall be released and limited to 30¢ per pound of the weight of the loss [*sic*] or damaged article" (Pet. 34a). The limitation on liability was deemed "to relate to all services undertaken by the carrier or its agents" (Pet. 35a).

The trial court awarded Johnson the stipulated actual damages (Pet. 18a–22a) and the Supreme Court of Idaho affirmed (Pet. 1a–15a, 389 P. 2d 109). The appellate court agreed with Bekins that the limitation-of-liability provisions of the tariff applied to "additional accessorial protective services," such as the packaging in a barrel contracted for here (Pet. 9a); and that "if, upon performance, the shipper sustains loss or damage, then * * * the carrier's liability [is] limited to the released value of 30 cents per pound, unless the shipper has declared a different value" (Pet. 7a). The court ruled, however, that the limitation-of-liability was not applicable to a loss caused by the carrier's "utter disregard of its covenant to perform" a specially requested protective service (Pet. 7a, 8a, 9a). The court ruled (Pet. 15a):

> This special covenant—for the protective packaging of [Johnson's] hi-fi set—which [Johnson] specifically requested and [Bekins] specifically agreed to perform upon receipt of an additional charge, is the precise ground upon which we affirm the decision of the trial court. * * * [I]f the carrier fails to perform its covenant and treats it as nonexistent, then it cannot limit its liability in the same manner as though it had performed, and the shipper is not bound by the terms of the covenant imposing limited liability.

ARGUMENT

Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11) (Pet. 23a–25a), provides that com-

mon carriers are permitted, when "expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released".[1] The Commission has granted such authority to household goods carriers (Released Rates Order No. MC–362, Pet. 28a–30a), and the tariff involved here (No. 78B, MF–I.C.C. No. 90, Pet. 34a–35a) was admittedly based upon the Commission's order (Pet. 32a). The tariff states that as to "all services undertaken" by the carrier: "If shipper fails to declare the value of the entire shipment in writing upon the bill of lading, the liability of the carrier for loss or damage to any article carried or held in storage in transit pursuant to this tariff shall be released and limited to 30¢ per pound of the weight of the loss [*sic*] or damaged article."

Where Section 20(11) and the orders of the Commission made pursuant to the section apply, no agreement in derogation of them is valid. See *Southwestern Sugar Co.* v. *River Terminals Corp.*, 360 U.S. 411, 420, n. 9, and cases there cited. This is simply an application of the general rule that carriers may not lawfully enter into special contracts inconsistent with tariffs filed with the Commission and

[1] This section of the Act is made applicable to motor common carriers by 49 U.S.C. 319 (Pet. 26a–27a).

outside their standard bills of lading. *Missouri, K. & T. R. Co.* v. *Ward*, 244 U.S. 383; *Texas & P. R. Co.* v. *Leatherwood*, 250 U.S. 478. It is, moreover, clear that limitation-of-liability clauses apply to accessorial services such as packing in a barrel. See *Cleveland, C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U.S. 588. The Commission would regard with the greatest concern any decision authorizing some form of collateral agreement departing from the limitation-of-liability provisions authorized by the motor carrier's tariff or the released rates order.

As we understand the opinion below, however, the Supreme Court of Idaho did not purport to give effect to any collateral agreement inconsistent with the tariff petitioner had filed with the Commission. It recognized that the Commission's released rates order applicable to household goods carriers was valid and binding upon the court and the parties before it (Pet. 7a). The court merely construed the limitation-of-liability provision as inapplicable where the carrier had wholly failed to perform a specially requested protective service, in this case providing special packing for the high-fidelity set. But it recognized that the limitation-of-liability provision applied to accessorial services; it indicated that, had petitioner damaged Johnson's hi-fi through negligent performance of its packing duties, the shipper's recovery would have been limited to 30¢ per pound, or $15 (Pet. 7a).

The exception which the court thus found implicit in the Commission's released rates order, as well as in the tariff filed by Bekins and the bill of lading used by the parties, was both narrow—applicable only where the carrier had made no attempt to perform a contracted-for protective service—and, we are inclined to believe, not unreasonable as an interpretation of the legitimate expectations of the parties.[2]

Except where the question "raises issues of transportation policy which ought to be considered by the Commission in the interest of a uniform and expert administration of the regulatory scheme laid down by [the] Act" (*United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 65), "what construction shall be given a railroad tariff presents ordinarily a question of law

[2] Few guidelines have been developed in the lower courts in related contexts of statutory or contractual interpretation. A carrier would be liable for the actual loss if it were to convert the goods to its own use or if the loss flowed from a fraud of the carrier—and we assume that the same result would follow were the carrier deliberately to destroy the goods for no valid reason. See *Glickfeld* v. *Howard Van Lines*, 213 F. 2d 723, 727 (C.A. 9); *Dexter & Carpenter, Inc.* v. *Davis*, 281 Fed. 385, 388 (C.A. 4); *Moore* v. *Duncan*, 237 Fed. 780, 783-784 (C.A. 6); *Mitchell* v. *Union Pac. R. Co.*, 188 F. Supp. 869, 874 (S.D. Cal.). On the other hand, there is authority going both ways as to whether actual damages can be obtained where the carrier has been grossly or wantonly negligent. Compare *Bassett* v. *Chicago & N.W. Ry. Co.*, 168 Wis. 617, 171 N.W. 749 (limited liability provisions applied) with *Nashville, C. & St. L. Ry. Co.* v. *C. V. Truitt Co.*, 17 Ga. App. 236, 86 S.E. 421 (actual damages allowed).

which does not differ in character from those presented when the construction of any other document is in dispute"—*i.e.*, a typical judicial function like construction of a contract. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291. In the present case, the construction of the tariff does not involve an exercise "of discretion in technical matters" and does not require an "acquaintance with many intricate facts of transportation" (*ibid.*). We therefore think that interpretation of the limitation-of-liability provision in this case was properly undertaken by the State courts.

If other courts in future cases were to extend the very narrow exception created below in such a way as to threaten to dissipate the benefits in exchange for which the carriers offer reduced rates, the Commission might feel compelled to challenge the holdings and, perhaps, also to assert the necessity of prior recourse to its expert judgment in interpreting the tariffs. Similarly, if the present case involved a holding that a carrier and a shipper were free to supplement the provisions of a bill of lading in ways inconsistent with the tariff, we would believe that review by this Court would be necessary. But the decision below, as we read it, represents no more than a bona fide exercise of State court jurisdiction to decide a question of construction in a way which does not threaten the tariff approved by the Commission. We

therefore believe that there is no necessity for this Court to undertake review of the decision below in the absence of a conflict in decisions.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

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No. 71

BEKINS MOVING & STORAGE COMPANY, *Petitioner*,

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DONALD JOHNSON, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

REPLY OF PETITIONER TO MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

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REPLY OF PETITIONER TO MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

The memorandum filed in this proceeding on behalf of the Interstate Commerce Commission compounds the confusion and uncertainty in the law created by the Idaho Supreme Court decision and emphasizes the necessity for action by this Court. The basic rate structure of the entire household goods carrier in-

dustry, consisting of more than 2,400 motor carriers holding certificates of public convenience and necessity from the Interstate Commerce Commission, is constructed upon the released rate orders of the Commission, issued in accordance with section 20(11) of the Interstate Commerce Act. The Idaho Supreme Court, on its own initiative and without prior referral to the Interstate Commerce Commission, has taken upon itself to create an "exception" to the provisions of the released rate order issued to the household goods carriers by the Commission. The Commission acknowledges that the "exception" is novel, that it was created by the Idaho Court and not by the Commission, and that if the "exception" were to be extended by other courts in the future, the Commission would then step in and put a stop to the matter. In other words, the Commission is saying that the Idaho Supreme Court has only slightly invaded the territory exclusively assigned to the Interstate Commerce Commission by Congress, but if the invasion becomes serious, then the Commission will take appropriate action. In this attitude, the Commission is shirking its responsibility. The time to rout out a malignancy is at its inception, and not when it has multiplied to the point where it is about to destroy the organism.

The Commission does not disagree with the legal principles asserted in the Petition for Certiorari. In fact, at page 5 of its Memorandum, the Commission states:

> "It is, moreover, clear that limitation-of-liability clauses apply to accessorial services such as packing in a barrel. See *Cleveland, C.C. & St. L. R. Co.* v. *Dettlebach*, 239 U.S. 588. The Commission would regard with greatest concern any decision

> authorizing some form of collateral agreement departing from the limitation-of-liability provisions authorized by the motor carrier's tariff or the released rate order."

Thus, the Commission would not have tolerated a voluntary payment by Bekins to Mr. Johnson of the value of his hi-fi set, because such payment would have been a form of collateral agreement between the carrier and the shipper departing from the specific limitation of liability in the tariff and the Commission's released rate order. But the Commission apparently is willing to compromise its position if a State Court condones such a departure from the terms of the tariff and the released rate order.

The decision of the Idaho Supreme Court recognizes the existence of the limitation of liability provisions in the carrier's tariff and the Commission's released rate order, but it creates an exception thereto by stating that those provisions apply only to misfeasance and not to nonfeasance. The Commission, at page 7 of its Memorandum, refers to ". . . the very narrow exception created below . . .", thereby acknowledging, as petitioner contends, that *such exception never existed until it was created by the Idaho Supreme Court in this proceeding.* If the Idaho court is to be permitted to create exceptions to orders of the Interstate Commerce Commission, then every other State court presumably would have the same right, and the inevitable result would be to undermine a basic purpose of the Interstate Commerce Act—that of preserving uniformity of treatment of all shippers by all carriers engaged in interstate commerce.

The Commission argues in its Memorandum (pp. 6-7), that except where "the interest of a uniform and

expert administration of the regulatory scheme laid down by the Act" is required, State Courts are permitted to interpret the provisions of carrier tariffs if the question presented "does not differ from those presented when the construction of any other document is in dispute." *What more fundamental and significant a matter requiring uniform and expert interpretation can be presented than the scope and effect of the Commission's own released rate order issued under the provisions of Section 20(11) of the Interstate Commerce Act, upon which the entire structure of household goods carrier rates is based?*

As to the substance of the exception to the limitation of liability provisions of the Commission's released rate order and the carrier's tariff, which the Idaho Supreme Court has created, that exception states that the limitation applies only to misfeasance and not to nonfeasance, i.e., that it applies only to negligent performance and not to negligent failure to perform.[1]

The Commission's released rate order does not make this distinction between misfeasance and nonfeasance; the carrier's tariffs do not make this distinction; and the statute, in authorizing released rate orders, makes no such distinction. This Court itself, in construing the scope of Section 20(11) of the Interstate Commerce Act, which section authorizes the Commission to

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[1] In Footnote 2 of the Commission's Memorandum, cases are cited in which full rather than limited liability has been allowed because of wrongful conversion or gross or wanton negligence on the part of the carrier. Here the finding of fact is that the carrier was guilty of simple negligence in failing to place the hi-fi set in a barrel in the course of loading the entire contents of Mr. Johnson's home into a moving van.—Pet. p. 22a. This was a matter of simple oversight by the men doing the loading rather than wantonness.

issue released rate orders, has stated that the statutory provision is all inclusive (*Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 at 29):

> "The words of the statute are 'broad enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination.' ".

In this case the carrier failed to discharge its undertaking to place the hi-fi set in a barrel. The Commission fully agrees that its released rate order applies not only to the transportation service itself but also to accessorial services such as packing items in a barrel (Memo. p. 5), with the result that a failure to perform an accessorial service has the same legal consequences as a failure to perform the transportation itself. Thus, under the exception created by the Idaho Court decision, if any item of household goods in the shipment should be lost, stolen or destroyed during the course of the loading and prior to the actual transportation, the carrier would be guilty of a nonfeasance, rather than a misfeasance, with respect to its contract to transport such item to destination, and it would thereby be subjected to full liability for such item, rather than the limited liability for which the shipper contracted.

The released rate order of the Commission is the foundation upon which the entire rate structure of the household goods carriers is built. The Supreme Court of Idaho, on its own initiative, and without prior referral of the issue to the Interstate Commerce Commission, has taken upon itself to undermine that whole rate structure by stating that the released rate order of the Commission applies only to misfeasance and

not to nonfeasance. The particular factual situation upon which the Idaho Court relies is a narrow one, but the principle announced by that Court, if it is permitted to stand, will find application in countless other situations. *If the doctrine of primary jurisdiction has any meaning whatsoever, certainly interpretation of the scope and effect of a basic order of the Commission underlying the entire structure of carrier rates is a matter within the primary jurisdiction of the Commission.*

If the Interstate Commerce Commission intends that an exception, however narrow, be made to an outstanding released rate order which it has issued, and upon which the carriers have long relied in constructing their rates, such exception should be made in the course of a proceeding before the Commission in which due process has been followed, and not simply by the Commission defaulting when a State court usurps the Commission's prerogative and itself amends the Commission's order.

Petitioner respectfully submits that now, as a result of the completely incongruous position taken by the Commission, the need is even greater for this Court to grant certiorari and resolve for the household goods

carrier industry the dilemma created by the Idaho Supreme Court decision.

Respectfully submitted,

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